Filing # 155819438 E-Filed 08/22/2022 02:49:37 PM

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC-22-0735

ALLSTATE INSURANCE CO.,
Appellant,

v.

REVIVAL CHIROPRACTIC, LLC,
Appellee.

ON REVIEW OF CERTIFIED QUESTION
FROM THE U.S. COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

AMICUS BRIEF
IN SUPPORT OF APPELLANT

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RECEIVED, 08/22/2022 02:50:20 PM, Clerk, Supreme Court

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PRELIMINARY STATEMENT

Personal Insurance Federation of Florida ("PIFF") submits its Amicus Brief in support of appellant Allstate Insurance Company ("Allstate"). This Eleventh Circuit appeal arises from a proposed class action suit filed by appellee Revival Chiropractic LLC ("Revival") under the Florida Motor Vehicle No-Fault ("PIP") Statute. *See* Fla. Stat. § 627.736 (2017).

The federal Court of Appeals certified a question of Florida law involving recent decisions by this Court and Florida district courts interpreting the PIP Statute. *See* MRI Assocs. of Tampa, Inc. v. State Farm Mut. Ins. Co., 334 So. 3d 577 (Fla. 2021), *cert. denied*, 142 S. Ct. 1677 (2022); *see also* GEICO Indem. Co. v. Muransky Chiro. P.A., 323 So. 3d 742 (Fla. 4th DCA 2021); Hands on Chiro. PL v. GEICO Gen. Ins. Co., 327 So. 3d 439 (Fla. 5th DCA 2021) (collectively, the "GEICO Opinions").

Unless otherwise indicated, all emphasis in quotations is added by counsel.

I. INTRODUCTION

At the request of both parties, the Eleventh Circuit certified the following question of Florida law to this Court: "When a [PIP] insurance policy provides notice that it will limit payment pursuant to the statutory schedule of maximum charges, may an insurer pay 80% of the charge submitted, even when the charge submitted is less than 80% of the statutory schedule of maximum charges [the 'Schedule']?" Revival Chiro. LLC v. Allstate Ins. Co., No. 21-10559, 2022 WL 1799759, at *4 (11th Cir. June 2, 2022); *see also* id., 2022 WL 1799759, at *1. This question poses what commonly is called the "billed amount" issue. *See* Progressive Am. Ins. Co. v. Back on Track, LLC, No. 2D-21-0541, 2022 WL 2374660, at *2 (Fla. 2d DCA July 1, 2022), *pet. review filed* (Fla. Aug. 1, 2022) (No. SC-22-0990).

The Eleventh Circuit sought guidance on this question due to the "tension" that it perceived between this Court's ruling in MRI Associates and the GEICO Opinions. *See* Revival v. Allstate, 2022 WL 1799759, at *4 ("As of this writing, none of Florida's intermediate appellate courts have conclusively addressed the tension between *MRI Associates* and [the GEICO Opinions].").

A month after the Eleventh Circuit's request, the Second District issued a comprehensive opinion on the billed amount issue, analyzing MRI Associates and certifying conflict, in part, with the GEICO Opinions. *See* Progressive v. Back on Track, 2022 WL 2374660 (ruling for insurer).[1]

PIFF urges this Court to answer the Eleventh Circuit's question affirmatively in accordance with MRI Associates and the Second District's well-reasoned decision in Back on Track.

II. STATEMENT OF INTEREST

PIFF is a leading voice for the personal lines property and casualty insurance industry in Florida. PIFF represents national insurance carriers and their subsidiaries, including many of the state's top writers of private passenger auto and homeowners multi-peril insurance. PIFF advocates for a healthy and competitive insurance marketplace for the benefit of Florida consumers. PIFF has worked with the legislative and executive branches

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[1] Back on Track and Progressive both have asked this Court to accept jurisdiction to resolve the conflict certified by the Second District. *See* No. SC-22-0990, Pet'r's Am. Br. Jurisdiction (Aug. 12, 2022) & Resp't's Br. Jurisdiction (Aug. 12, 2022).

of government, as well as state regulators, the business community and consumer groups to make Florida a better place in which to insure a vehicle or home.

In this role, PIFF often appears as *amicus curiae* in Florida courts offering its perspective on public policy issues affecting insurers and insureds. For example, PIFF filed an amicus brief in this Court in the recent MRI Associates case, also arising under the PIP Statute. *See* No. SC-18-1390, Br. *Amici Curiae* (Fla. Nov. 6, 2019). The certified question posed here concerns the effect of the Court's ruling in that related case.

III. SUMMARY OF THE ARGUMENT

As the Eleventh Circuit observed, this Court's decision in MRI Associates "undermined" the reasoning of the GEICO Opinions on which the federal district court relied. Revival, 2022 WL 1799759, at *3. This Court should clarify, in accordance with MRI Associates and with the Second District's recent ruling in Back on Track, that: (a) the PIP Statute does not require Allstate to apply the Schedule exclusively to all charges; and (b) Allstate's payment of 80% of Revival's billed charge satisfies the Statute's

reasonable coverage mandate. The Court, therefore, should answer the Eleventh Circuit's question in the affirmative.

As the MRI Associates Court held, the Schedule is an **optional** method of capping PIP medical reimbursements. Allstate can choose to limit payment based on the Schedule; but it also can pay 80% of a billed charge, consistent with its policy language. Other PIP insurers with different policy language can use other methodologies, provided that they pay a reasonable amount. Revival hardly can complain that the amount of its own charge is unreasonable. Allstate thus properly paid 80% of the amount Revival actually billed.

This Court should reject the GEICO Opinions' contrary interpretations of the PIP Statute. But the GEICO Opinions may be distinguishable from this case (and from Back on Track) due to the unusual language of GEICO's policy, which promises to pay 100% of "lesser charges."

Finally, the Second District's interpretation of the billed amount issue accords with the legislative intent underlying the PIP Statute, including the goals of reducing PIP costs and premiums and of benefitting Florida insureds.

IV. ARGUMENT

A. IN *MRI ASSOCIATES*, THIS COURT CLARIFIED FLORIDA PIP LAW AS TO SECTION 627.736(5)(a).

1. The PIP Statute's Reasonable Coverage Mandate.

The PIP Statute imposes dual obligations, requiring: (a) medical providers to charge reasonable amounts to PIP insureds and insurers; and (b) insurers to reimburse 80% of all reasonable expenses for necessary medical services. *See* Fla. Stat. §§ 627.736(1)(a) & 627.736(5)(a); *see also* Allstate Ins. Co. v. Orthopedic Specialists, 212 So. 3d 973, 976 (Fla. 2017) ("The PIP statute sets forth a basic coverage mandate: every PIP insurer is required to – that is, the insurer 'shall' – reimburse eighty percent of reasonable expenses for medically necessary services.") (citing GEICO Gen. Ins. Co. v. Virtual Imaging Servs., Inc., 141 So. 3d 147, 155 (Fla. 2013)). As this Court observed, the reasonable medical expenses coverage mandate "is the heart of the PIP statute's coverage requirements." Allstate v. Orthopedic Specialists, 212 So. 3d at 976 (citing Virtual Imaging, 141 So. 3d at 155); *see also* id. at 977 ("A PIP policy cannot contain a statement that the insurer will not pay eighty percent of reasonable charges

because no insurer can disclaim the PIP statute's reasonable medical expenses coverage mandate.").

The Florida Legislature has provided guidance about how to determine the reasonableness of PIP medical charges. For example, PIP providers may not charge more than what they customarily charge for similar services and insurers may consider reimbursement levels in the community and other information:

> [S]uch a charge may not exceed the amount the person or institution customarily charges for like services or supplies. In determining whether a charge for a particular service, treatment, or otherwise is reasonable, **consideration may be given to evidence of usual and customary charges and payments accepted by the provider involved in the dispute, reimbursement levels in the community** and various federal and state medical fee schedules applicable to motor vehicle and other insurance coverages, and other information relevant to the reasonableness of the reimbursement for the service, treatment, or supply.

Fla. Stat. § 627.736(5)(a). The question here is whether Allstate's payment of 80% of Revival's invoice satisfies the PIP Statute's reasonable coverage mandate. *See* Progressive v. Back on Track, 2022 WL 2374660, at *6 ("[A] determination of whether a particular payment is or is not reasonable should be a fundamental component in the resolution of **any** dispute over the amount

of reimbursement a PIP insurer has paid to a medical provider.”) (emphasis in original).

2. The Legislature Amended the PIP Statute by Adding the Schedule of Maximum Charges and the Notice Provision.

In 2008, concerned about rising medical expenses and their impact on insurance premiums, the Florida Legislature added a “schedule of maximum charges” to the PIP Statute. *See* Fla. Stat. § 627.736(5)(a)2. (2008). Issues regarding Florida auto insurers’ use of the Schedule created controversy and substantial litigation. *See* Progressive v. Back on Track, 2022 WL 2374660, at *3 (“Much of the battle for the last ten years or so has been over insurers’ use of the fee schedule limitations, which the legislature implemented in 2008.”).

In 2012, the Legislature again amended the PIP Statute in response to a statewide insurance crisis.[2] It retained a schedule of maximum charges similar to that in the 2008 version of the

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[2] The Legislature acted, in large part, to address its concerns about extensive fraud in the PIP arena. *See* Robbins v. Garrison Prop. & Cas. Ins. Co., 809 F.3d 583, 587 (11th Cir. 2015) (“The Florida legislature’s purpose in amending the [PIP Statute] in 2012 was to reduce the payment of fraudulent claims in order to lower insurance premiums.”) (citing legislative history).

Statute. *See* Fla. Stat. § 627.736(5)(a)1. ("The insurer may limit reimbursement to 80 percent of the following schedule of maximum charges: [sub-parts a-f.]"). And it added a provision addressing how an insurer may cap payment pursuant to the Schedule:

> An insurer **may limit payment** as authorized by this paragraph only if the insurance policy includes a notice at the time of issuance or renewal that the insurer may limit payment pursuant to the schedule of charges specified in this paragraph. A policy form approved by the [Office of Insurance Regulation] satisfies this requirement. If a provider submits a charge for an amount less than the [Schedule] amount . . ., the insurer **may pay** the amount of the charge submitted.

Id. § 627.736(5)(a)5. (the "Notice Provision"). The last sentence of the permissive Notice Provision addresses "lesser charges" – such as Revival's charges that are below the Schedule amount.

3. This Court Rejected the Claim That There Are Two Mutually Exclusive Methods of PIP Reimbursement.

In MRI Associates v. State Farm, this Court considered an insurer's election to cap payments based on the Schedule under the current version of the PIP Statute – which governs this case. The Court applied its prior PIP decisions (interpreting the 2008 version of the Statute) as well as the 2012 PIP amendments that

created the permissive Notice Provision.[3] The Court held that "a reasonable reading of the statutory text requires that reimbursement *limitations* based on the [Schedule] be understood . . . simply as an **optional method of capping reimbursements** rather than an exclusive method for determining reimbursement rates." 334 So. 3d at 584-85 (italics in original). This ruling clarified Florida's unsettled PIP law.

In MRI Associates, the provider petitioner claimed that there are two mutually exclusive methods of PIP reimbursement – (1) the use of the factors set forth in section 627.736(5)(a) to determine reasonableness; and (2) payment based on the prices in the Schedule. This Court flatly rejected the provider's argument as a misinterpretation of its prior PIP decisions, saying: "We have never held that the 'reasonable charge method' and the 'schedule of maximum charges' are mutually exclusive methods for determining the reasonableness of reimbursements.

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3 *See* 334 So. 3d at 579 ("This is the third time in the last decade that we have considered a case in which a medical services provider, as the assignee of an insured's PIP policy benefits, challenged an insurer's use of the PIP statutory schedule of maximum charges.") (citing Orthopedic Specialists & Virtual Imaging).

Neither *Virtual Imaging* nor *Orthopedic Specialists* contains any such holding." 334 So. 3d at 583.

The MRI Associates Court pointed to the "permissive nature" of the Notice Provision. 334 So. 3d at 584 (quoting sub-section (5)(a)5. & emphasizing "may"). The Court found that this permissive language "cannot be reconciled with the argument that an election to use the limitations of the [Schedule] precludes an insurer's reliance on the other statutory factors for determining the reasonableness of reimbursements." Id. "On the contrary," the Court said, "the language signals that **the insurer is given an option that may be used in addition to other options** that are authorized." Id. Insurers (such as Allstate, Progressive and State Farm) that elect to limit PIP reimbursements based on the Schedule thus are not required to pay based on the Schedule caps exclusively.

B. THE SECOND DISTRICT CORRECTLY APPLIED *MRI ASSOCIATES* TO THE BILLED AMOUNT ISSUE.

Although MRI Associates involves a different PIP issue (policy election of the Schedule), "the reasoning of [the decision] nonetheless guides [the] resolution" of the billed amount issue.

Back on Track, 2022 WL 2374660, at *9. The Second District correctly applied this reasoning by approving Progressive's payment of 80% of the provider's billed charge.

1. The PIP Statute Does Not Require Insurers to Apply the Schedule to All PIP Bills.

In MRI Associates, this Court rejected the provider's payment dichotomy argument – which is a "variation" of the argument made now by Revival, Back on Track and other PIP providers in the billed amount suits:

> [Plaintiff] BOT agrees that Progressive is entitled to use the statutory schedule of maximum charges but argues that because Progressive's policy contains a fee schedule election notice, it must pay **all** charges in accordance with the [Schedule]. This is a *variation* on the provider's argument in [MRI Associates], which was that State Farm could determine provider reimbursements either by consulting the [reasonableness] factors in section 627.736(5)(a) **or** by using the fee schedule limitations in section 627.736(5)(a)1, but was constrained to **exclusively** use one or the other of the two options.

Back on Track, 2022 WL 2374660, at *9 (bold in original); *see also* id. at *6 ("Reduced to simple terms, BOT's theory is that once a PIP insurer makes a 'fee schedule election,' the [Schedule] becomes the **exclusive** payment methodology for all medical provider

reimbursements."); Revival, 2022 WL 1799759, at *2 (noting Revival's claim that "because Allstate provided notice of its intent to use that schedule, it must adhere to that payment methodology") (internal punctuation omitted).

The Second District properly rejected the providers' "exclusive" argument as contrary to MRI Associates, which holds that insurers electing the Schedule may use other payment methodologies, provided they pay 80% of a reasonable amount. *See* Back on Track, 2022 WL 2374660, at *9 ("[T]he import of these pronouncements [in MRI Associates] is that Progressive's policy-based notice that it will deem unreasonable those charges that exceed the [Schedule] does not preclude it from relying on section 627.736(5)(a) to determine a reasonable reimbursement for BOT's charges billed below the applicable fee schedule amount."); *see also* Revival, 2022 WL 1799759, at *3 (noting MRI Associates "undermined" reasoning of providers' argument) ("There, the Supreme Court of Florida held that an insurer could simultaneously use the 'reasonable charge' method for calculating reimbursements and also elect the 'schedule of maximum charges' limitation.").

2. Payment of 80% of a PIP Provider's Charge Satisfies the Statute's Reasonable Coverage Mandate.

Because Allstate is entitled to consider Revival's charge under sub-section (5)(a), the question becomes whether that charge is presumptively reasonable and whether Allstate's 80% payment thus is proper. As the Second District found in the analogous Back on Track case, the answer is YES. *See* 2022 WL 2374660, at *10 ("Progressive's payment of BOT's charges at 80 percent of the amount that **BOT itself chose to bill** unquestionably satisfied Progressive's obligation under the coverage mandate – that is, to reimburse BOT for 80 percent of the reasonable expenses BOT incurred in treating Progressive's insured[.]").

The Second District offered three factors to support its decision – all of which apply in this case as well. First, because the provider must charge "a reasonable amount," Allstate "could assume that [Revival's] charge was reasonable; it certainly was not required to assume that [Revival] charged an unreasonably low amount." Back on Track, 2022 WL 2374660, at *10 (citing § 627.736(5)(a)). Second, Revival's charge "may not exceed the amount it customarily charges for like services or supplies,

so [Allstate] legitimately could conclude that [Revival] charged [Allstate] what [Revival] customarily charges for like services." Id. (internal punctuation omitted). Third, "in determining a reasonable reimbursement for [Revival's] charges, [Allstate] was authorized to consider evidence of usual and customary charges and payments accepted by [Revival], and there is no better evidence of [Revival's] usual and customary charges than [its] charges themselves." Id. (internal punctuation omitted).

Allstate's payment of 80% of Revival's charge, therefore, satisfies the PIP reasonable coverage mandate.

C. THE FOURTH AND FIFTH DISTRICTS MISINTERPRET THE PIP STATUTE AND THEIR DECISIONS ARE DISTINGUISHABLE BASED ON POLICY LANGUAGE.

This Court should reject the GEICO Opinions insofar as they misinterpret the PIP Statute. But the Court could find in Allstate's favor and yet approve the results of those Opinions, which are distinguishable based on the unusual language of the GEICO policy.

1. The GEICO Opinions Misinterpret the Notice Provision of the Amended PIP Statute.

The Fourth and Fifth Districts ruled against GEICO on two grounds. First, the courts ruled based on their interpretation of the PIP Statute, including the Notice Provision in sub-section (5)(a)5. *See* GEICO v. Muransky, 323 So. 3d at 747 ("[U]nder the PIP statute, if the billed amounts are less than 80% of the fee schedule, the insurer may pay the billed amounts in full or pay the 80% reimbursement rate of maximum charges."); Hands on Chiro. v. GEICO, 327 So. 3d at 443 ("There is nothing in the applicable [PIP] statute or Geico's policy that allows it to pay 80 percent of the billed amount.").

The Court should reject this mis-reading of the Statute and, instead, should adopt the Second District's interpretation of the permissive Notice Provision:

> We disagree with the Fifth District's interpretation of subsections (5)(a)1 and (5)(a)5. By saying that an insurer "**may**" pay the full amount of a [lesser charge] (i.e., less than 80 percent of the applicable schedule of maximum charges), subsection (5)(a)5 permits – but does not require – an insurer to pay the full amount of the charge. . . . There is nothing uncertain or ambiguous about the word "may," which is "permissive."

Back on Track, 2022 WL 2374660, at *11 (citation & internal punctuation omitted; emphasis in original); *see also* MRI Associates, 334 So. 3d at 584 (construing "may" in first sentence of sub-section (5)(a)5. as permissive); Virtual Imaging, 141 So. 3d at 157 (holding that Schedule itself is optional in view of statutory phrase "may limit reimbursement").

2. The GEICO Opinions Are Distinguishable Due to GEICO's Unusual Policy Language.

The GEICO Opinions also address the insurer's unusual policy language stating: "A charge submitted by a provider, for an amount less than the amount allowed [under the Schedule] **shall be paid in the amount of the charge submitted**." Muransky, 323 So. 3d at 748 (noting that "policy indicates Geico's promise to pay certain charges 'in the amount of the charge submitted,' *i.e.*, 100% of billed amounts less than the 80% reimbursement rate"); *see also* Hands on Chiropractic, 327 So. 3d at 442 n.3 ("Geico contractually elected to always pay the billed amount in full where the billed amount was less than 80 percent of the 200 percent of the applicable fee schedule.").

There is no such promise in Allstate's policy. To the contrary, the policy specifies that Allstate will pay no more than 80% of "lesser charges." *See* Initial Br. at 9 ("If a provider submits a charge for an amount less than the amount determined by the [Schedule] or other limitations established by [the PIP Statute], **[Allstate] will pay eighty percent of the charge that was submitted**.") (quoting policy).

The Second District pointed out a similar difference between the GEICO and Progressive policies. *See* Back on Track, 2022 WL 2374660, at *11 ("And unlike the Geico policy at issue in [the GEICO Opinions], Progressive's policy does not include a provision stating that it will pay the full amount of a charge that is less than the amount allowed under the statutory [Schedule].").[4] That is why the Second District certified conflict with the GEICO Opinions "**to the extent** those decisions" are based on misinterpretations of the PIP Statute. Back on Track, 2022 WL 2374660, at *1; *see also* id. at *4 ("it appears that the

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[4] *See also* MRI Associates, 334 So. 3d at 580-81 (quoting State Farm's policy, which elects the Schedule as an optional cap for medical reimbursements and contains no promise regarding lesser charges).

ultimate holding [in Muransky] was based on Geico's policy language").

This Court, therefore, should disapprove the GEICO Opinions to the extent that they misinterpret the PIP Statute, but may find that those decisions are distinguishable.

D. THE SECOND DISTRICT'S INTERPRETATION OF THE BILLED AMOUNT ISSUE ACCORDS WITH FLORIDA'S PUBLIC POLICY GOALS.

1. Revival's Interpretation Would Frustrate the Legislative Intent Underlying the PIP Statute.

Revival's interpretation of the billed amount issue conflicts with the legislative history and goals of the PIP Statute. The 80% coverage rule has been a critical component of Florida PIP law since 1977, intended to reduce insurance costs and premiums. And the Notice Provision is part of the 2012 PIP amendments that similarly were enacted to address rising PIP costs. There is no evidence suggesting that the Notice Provision creates an exception to the 80% coverage limitation.

"Since its inception in 1971, the PIP statute has required insurers to provide coverage for reasonable expenses for necessary medical services." Virtual Imaging, 141 So. 3d at 153. When

insurance premiums began to climb, the Florida Legislature undertook a "substantial rewrite of both insurance company regulation and required automobile insurance coverage," with the goal of "reduc[ing] skyrocketing insurance premiums while still maintaining adequate protection for the drivers of this state." Fla. Legis., 1977 Summary of General Legislation 141 (Aug. 1977) (available at FSU Law Library). In addition to other reforms, "the Legislature amended the medical benefits coverage provided by the PIP statute from 'all reasonable expenses' to 'eighty percent of all reasonable expenses.'" Virtual Imaging, 141 So. 3d at 153 n.6 (citation omitted).

The Legislature never created an exception to the 80% coverage limitation (and the 20% co-insurance requirement). Revival's claim that Allstate should pay 100% of its charge (instead of the customary 80%) ignores the Legislature's actions and its goal of reducing PIP costs and premiums.

2. Revival's Interpretation Improperly Benefits Providers at the Expense of Insureds.

Adopting Revival's interpretation of the Notice Provision would incentivize providers to avoid the Schedule and the PIP

Statute's 80% coverage mandate by submitting bills just under the Schedule amounts. The result would benefit providers and harm insureds, contrary to the purpose of the Statute.

Revival's view is contrary to the legislative intent to benefit insureds (not providers). Although it may appear at first that Revival's approach favors insureds by eliminating their co-payment, in fact, requiring insurers to pay inflated provider bills would damage insureds by depleting their limited PIP benefits. Benefits are capped at $10,000 for emergency medical conditions and at $2500 otherwise. Second, the escalating medical costs that would result from Revival's interpretation would lead to increased premiums for all insureds – exactly the result that the 80% limitation and other PIP reforms were intended to counter.

3. Revival's Interpretation Would Render MedPay Coverage Meaningless.

Finally, Revival's request for payment of 100% of its charge ignores the purpose of medical payments ("MedPay") coverage. After the 80% limitation on PIP medical coverage was put in place, PIP insurers began to offer optional MedPay coverage for the 20% co-insurance. *See* State Farm Mut. Auto. Ins. Co.

v. Gonzalez, 178 So. 3d 448, 451 (Fla. 3d DCA 2015) ("Med-Pay benefits are essentially excess coverage that is not implicated until PIP benefits are paid and exhausted."). But under Revival's view, MedPay coverage would be redundant. Revival argues that insurers must pay lesser charges" in full, thus exhausting PIP benefits and rendering MedPay coverage meaningless.

V. CONCLUSION

For these reasons and those expressed in the Initial Brief, PIFF requests that this Court answer the certified question in the affirmative.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was e-mailed this 22nd day of August 2022 to all persons on the Service List.

/s/ Nancy A. Copperthwaite
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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this document complies with the applicable font requirements and word-count limits in the Florida Rules of Appellate Procedure.

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